ATTORNEY FOR APPELLANT:

BETH ANN FOLZ
McFadin Higgins & Folz
Mt. Vernon, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM C. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A01-0605-CR-212
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0409-FA-442

May 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

William C. Davis ("Davis") appeals his convictions for three counts of child molesting, one as a Class A felony and two as Class C felonies.[1] We affirm.

Issues

Davis raises two issues on appeal, which we reorder and restate as:

(1) Whether the trial court erred in denying Davis' Motion for Severance, and

(2) Whether the trial court abused its discretion in admitting evidence of statements Davis made while identifying himself.

Facts and Procedural History

Davis met J.C. and J.H. through their mother, Machelle Yott, and he met R.H. through R.H.'s uncle and mother.[2] J.C. and R.H. were born respectively February 17, 1992 and December 19, 1990.[3]

Davis introduced R.H. to J.C. and J.H. The boys spent time with Davis and stayed overnight at his home. On various occasions, Davis penetrated J.C.'s anus with his penis and fingers, placed his mouth and hands on J.C.'s penis, and forced J.C. to place his mouth and hands on Davis's penis. Similarly, Davis placed his penis against R.H.'s buttocks, placed his mouth and hands on R.H.'s penis, and forced R.H. to place his mouth and hands on Davis's penis. J.C. witnessed Davis's acts against R.H, while R.H. witnessed at least some of Davis's acts against J.C. Further, Davis forced each victim to place his mouth on the other

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[1] Ind. Code § 35-42-4-3(a), (b). See also Ind. Code § 35-41-1-9 for the definition of "deviate sexual conduct."

[2] R.H. is not related to the brothers.

victim's penis.

In July, 2004, Yott called 9-1-1 regarding a conversation she had had with J.C. about some of these events. Evansville Police Department Officer Jim Harpenau interviewed all three boys and spoke briefly with Davis by telephone. On September 16, 2004, the State charged Davis in Posey County with Failure to Register as a Sex Offender, a Class D felony,[4] and five counts of Child Molesting—two counts, Class A and C felonies, for acts against J.C., two counts, Class A and C felonies, for acts against J.H., and one count as a Class C felony for acts against R.H. The next day, the trial court issued a warrant for Davis's arrest.

Over six to eight months, Posey County Officer Dan Gaffney attempted to locate Davis, ultimately contacting the Federal Bureau of Investigation ("FBI") for assistance. FBI Agent Matthew Mohr ("Agent Mohr") compared a photograph in the arrest warrant with the photograph of a North Dakota driver's license for Mark Allen Davis. After comparing the photographs, Agent Mohr and two other FBI agents went to the Fargo residence listed for Mark Allen Davis. Davis opened the door to find the agents with their weapons drawn. Agent Mohr identified himself as "FBI." Transcript at 183. Upon recognizing Davis as the person they were seeking, Agent Mohr entered the residence. As the agents were detaining Davis, Agent Mohr said in an inquiring tone, "William." Tr. at 184. Davis responded, "I'm Mark. William is my brother. This happens all the time." Id. Despite Davis's statement, Agent Mohr remained convinced that the person detained was William Davis. Davis agreed

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[3] The parties stipulated that Davis was born September 21, 1972, making him older than age 21 at the time of the alleged incidents.

to go to the local sheriff's office to be fingerprinted for identification purposes. Because Davis had a broken leg, the agents were assessing how to transport him. During that time, the agents told Davis that "it would be easier on all of us if he would tell us the truth." Tr. at 185. Shortly thereafter, Davis said, "I'm Bill. My life is over." Id.

On November 4, 2005, Davis moved to sever the six counts into four different trials, as follows: both counts related to J.C., both counts related to J.H., the sole count for acts against R.H., and the count for failing to register as a sex offender. Subsequently, Davis filed his Amended Motion for Severance, seeking consideration of the six counts in three trials—a separate trial for the sex-offender-registry count and a separate trial for the count alleging acts against R.H. The State stipulated to severance of the count for Failure to Register as a Sex Offender. As to severance of the count for acts against R.H., the trial court denied Davis's motion, concluding that the five counts constituted a common modus operandi. Meanwhile, Davis moved unsuccessfully to suppress evidence of the statements he made to Agent Mohr in Fargo. Davis renewed both objections during the trial.

The jury acquitted Davis on the counts alleging acts against J.H., but found him guilty of Child Molesting as Class A and C felonies for acts against J.C. and Child Molesting as a Class C felony for acts against R.H.[5] The trial court entered judgment of conviction on the three verdicts and sentenced Davis to forty-five years imprisonment for the Class A felony conviction, seven years imprisonment on the Class C felony conviction for acts against J.C.,

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[4] Ind. Code § 5-2-12-9. During the 2006 Session, that chapter was repealed and replaced with I.C. §§ 11-8-8-1 to -20.

with those sentences running concurrently, and seven years imprisonment on the Class C felony conviction for acts against R.H., to run consecutively to the prior sentences. Thus, Davis's aggregate sentence is fifty-two years imprisonment. He now appeals.

Discussion and Decision

I. Severance of the Charges

Davis objects to having been tried for his conduct against R.H. in the same trial as the charges alleging his conduct against J.C. and J.H. Multiple offenses may be joined in the same information when the offenses are of the same or similar character or when the offenses are based upon the same conduct or series of connected acts. Ind. Code § 35-34-1-9(a). The defendant has a statutory right to sever offenses joined solely because they are of the same or similar character. Ind. Code § 35-34-1-11(a). However, when the offenses have been joined because they are based upon "the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan," the trial court:

> shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
>
> (2) the complexity of the evidence to be offered; and
>
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Ind. Code § 35-34-1-9(a) and -11(a).

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[5] Davis moved for change of venue from Posey County, citing pre-trial publicity. The trial court denied Davis's motion, and the parties stipulated to bringing in jurors from Monroe County.

Davis first argues that he had a statutory right to severance because the five offenses "were joined solely because they were of the same or similar character" and that the State failed to show that the offenses were based upon the same conduct or on a series of acts connected together. Appellant's Br. at 15. The trial court denied Davis's Motion for Severance because the offenses constituted a common modus operandi. As the trial court must sever offenses joined solely because they are of the same or similar character, our review of this conclusion is de novo. Booker v. State, 790 N.E.2d 491, 495 (Ind. Ct. App. 2003), trans. denied.

The parties dedicate most of their arguments toward the trial court's rationale for denying severance – common modus operandi. However, the phrase is a precise term of art, not found in either of the statutes controlling this issue. While our Supreme Court has analyzed modus operandi in determining whether acts were "connected together" for purposes of I.C. § 35-34-1-9(a)(2), the subsection is disjunctive.[6] Rather than analyzing

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[6] Our Supreme Court has held that "[o]ffenses may be sufficiently 'connected together' to justify joinder under subsection 9(a)(2) 'if the State can establish that a common modus operandi linked the crimes and that the same motive induced that criminal behavior.'" Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000) (quoting Ben-Yisrayl v. State, 690 N.E.2d 1141, 1145 (Ind. 1997)). The definition of modus operandi requires more than mere repetition of conduct. Penley v. State, 506 N.E.2d 806, 810 (Ind. 1987). "Modus operandi 'refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.'" Craig, 730 N.E.2d at 1265 (emphasis added).

The Craig Court held that severance was not required where the defendant molested two members of the same Brownie troop, in the same week, while the victims were spending the night at his home. He induced both to take a "taste test," covered their eyes with duct tape, placed an object in their mouths, and told them to suck on it. Id. Similarly, this Court affirmed the joinder of molestation charges where both victims were placed in the defendant's care, the molestations occurred in the victims' beds, and the defendant and both victims tested positively for gonorrhea. Booker, 790 N.E.2d at 495. The conduct in both of these cases featured unique, identifying qualities—a "taste test" and duct tape in Craig and the transmission of gonorrhea in Booker.

In contrast, where the offenses feature acts that are similar, but not so distinctive that the crimes are recognizable as the work of the same wrongdoer, our Supreme Court and this Court have rejected conclusions

modus operandi in evaluating whether Davis's acts were "connected together," we instead consider whether Davis's acts constituted the "same conduct" or a "single scheme or plan."

Davis victimized J.C. and R.H. in the same places, at the same times, in the presence of the other victim. Moreover, Davis forced J.C. and R.H. to perform sexual acts on each other. Under Ind. Code § 35-34-1-11(a), Davis does not have a right to severance where the offenses are based upon "the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." In applying this language to the attempted rape and rape of the same victim, our Supreme Court concluded that there was no right to severance because the acts were part of a single scheme or plan, even though committed six months apart. Runyon v. State, 537 N.E.2d 475, 477 (Ind. 1987) (making no analysis of modus operandi).

R.H. testified that Davis "made me blow [J.C.] and him. . . . And then he told [J.C.] to do it to me." Tr. at 123-24. Davis's victimization of J.C. and R.H. was the same conduct. Accordingly, Davis lacked a statutory right to sever these offenses pursuant to I.C. § 35-34-1-9(a) and -11(a).

Alternatively, Davis argues that the trial court abused its discretion under I.C. § 35-34-1-11(a) by denying his Motion for Severance. Under that subsection, the trial court shall grant severance where it is "appropriate to promote a fair determination of the defendant's

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of common modus operandi. See Penley 506 N.E.2d at 810 (regarding admission of evidence); Goodman v. State, 708 N.E.2d 901, 903 (Ind. Ct. App. 1999); and Pardo v. State, 585 N.E.2d 692, 695 (Ind. Ct. App. 1992) (ordering severance where the offenses were not linked by a common modus operandi, were not the subject of a common police surveillance, and no evidence supported the conclusion that the acts were connected).

guilt or innocence of each offense," considering the number of offenses, the complexity of the evidence, and "whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." Unlike the analysis above, we review the trial court's conclusion for an abuse of discretion. Craig, 730 N.E.2d at 1265. Specifically, Davis argues that the evidence was too complex for the charges to be tried jointly because of numerous inconsistencies in the victims' statements. For example, Davis notes that J.C.'s testimony contradicted R.H.'s testimony, and each victim's testimony contradicted earlier statements each had made to the police.

While the victims made inconsistent statements, Davis's trial was not terribly complex. The State charged Davis with five counts, against three boys, alleging the violation of one statute. Eight witnesses testified over two or three days, but the testimony of J.C. and R.H. was clear and sufficient to support the convictions. Moreover, the jury, in listening to the evidence, determined that Davis was not guilty of the counts alleging acts against J.H. The trial court did not abuse its discretion in concluding that a trial on all five counts would serve as a fair determination of Davis's guilt or innocence of each offense.

II. Admission of Statements to FBI

Davis also objects to the trial court's admission of his statements to Agent Mohr during his arrest in Fargo because Davis was not read his Miranda rights prior to making the statements. We review the trial court's decision to admit evidence for an abuse of discretion. Redden v. State, 850 N.E.2d 451, 458 (Ind. Ct. App. 2006), trans. denied. We reverse the

decision only where it is clearly against the logic and effect of the facts and circumstances. Id.

Miranda rights apply to custodial interrogation.[7] Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Under Miranda, 'interrogation' includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." White v. State, 772 N.E.2d 408, 412 (Ind. 2002) (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). Volunteered statements do not constitute interrogation. Id. "Police are not required to give Miranda warnings prior to asking routine questions regarding a person's identity." Serano v. State, 555 N.E.2d 487, 493 (Ind. Ct. App. 1990) (citations omitted), trans. denied.

Having compared the Indiana and North Dakota photographs, Agent Mohr went to the Fargo residence associated with the North Dakota driver's license. Once the FBI agents received Davis's consent to confirm his identity through fingerprinting, they told him that it would be easier "if he told them the truth about his identity." Appellant's Br. at 13. Davis responded, "I'm Bill. My life is over." Tr. at 185. As acknowledged by Davis on appeal, the questions were asked to confirm his identity. Appellant's Br. at 14. In United States v. Edwards, the Seventh Circuit held that an officer's questions regarding the defendant's identity did not constitute interrogation even though the defendant had not yet been advised of his Miranda rights. 885 F.2d 377, 385 (7th Cir. 1989), vacated and remanded on other grounds, 940 F.2d 1061. In part, the Edwards Court reasoned that such questions are not

[7] The State does not challenge Davis's contention that he was in custody when making the statements.

likely to elicit an incriminating response. Id. Similarly, there was no evidence in this case that it was reasonably likely that efforts to confirm Davis's identity would elicit an incriminating response. We therefore conclude that the trial court did not abuse its discretion in admitting Davis's statements to Agent Mohr.

Conclusion

We conclude that joinder of the five charges in one trial complied with the statute and allowed a fair determination of Davis's guilt or innocence as to each offense. Further, we conclude that the trial court did not abuse its discretion in admitting statements Davis made prior to being read his Miranda rights.

Affirmed.

SHARPNACK, J., and MAY, J., concur.